

ORDINANCE NO. BL2018-1419

An ordinance amending Title 4 of the Metropolitan Code to expand and update the existing procurement nondiscrimination program, originally established by legislation in 2008.

WHEREAS, the Metropolitan Government of Nashville and Davidson County (“Metropolitan Government”) engaged Griffin & Strong, P.C., a law and public policy consulting firm located in Atlanta, Georgia, to conduct a Disparity Study in 2018 as an update to the Disparity Study it conducted for the Metropolitan Government in 2004; and

WHEREAS, the Metropolitan Government further engaged Griffin & Strong to design and implement programs to reduce unlawful discrimination based upon race, gender, or ethnicity; and

WHEREAS, the 2018 Disparity Study of the Metropolitan Government concluded that there have been statistically significant disparities in both its prime contracting and subcontracting that are likely caused by the race and/or gender status of firm owners and that it remains a passive participant in unlawful discrimination against minority and women business enterprises (“MWBE”) in some of its procurements; and

WHEREAS, upon review of the results of the 2018 Disparity Study, the Metropolitan Government has concluded that it is advisable and desirable to expand and update the existing procurement nondiscrimination program (codified in Chapter 4.46 *et. seq.* of the Metropolitan Code) into a more comprehensive Equal Business Opportunity (“EBO”) program in an effort to further ameliorate or eliminate potentially unlawful discrimination against minorities and women, and/or the present effects of past discrimination, in Metropolitan Government procurement and contracting activities; and

WHEREAS, the Metropolitan Government desires to further remedy such discrimination in a way that is narrowly tailored to the findings of the 2018 Disparity Study; and

WHEREAS, after careful and lengthy consideration of a strong basis in evidence, including, but not limited to, the disparity study conducted by the Griffin & Strong, P.C. in 2018, the Metropolitan Government determined that it continues to have a compelling interest in assuring that the public funds that are collected from all of its citizens and then spent in Metropolitan Government contracting do not serve to finance private prejudice on the basis of race, gender, religion, national origin, ethnicity, age, disability, or any other form of unlawful discrimination; and

WHEREAS, the Metropolitan Government considered a full range of narrowly tailored race and gender-neutral and race and gender-conscious remedial policy options that were presented to it by Griffin & Strong, P.C. as part of its 2018 Disparity Study, which options are legally defensible and effective for addressing identified barriers to the full and equal participation of MWBEs in Metropolitan Government contracting; and

WHEREAS, pursuant to such a strong basis in evidence and after careful policy deliberations, the Metropolitan Government has decided to adopt and administer a revised and expanded remedial program for MWBEs that is based upon the 2018 Disparity Study as a factual predicate and consistent with these identified remedial policy options; and

WHEREAS, the policy approaches recommended by Griffin & Strong, P.C. have been favorably commented upon by the United States Supreme Court in *City of Richmond v. J. A. Croson*, 488 U.S. 469, 509-510 (1989), and by other federal courts; and

WHEREAS, Griffin & Strong, P.C. has recommended revisions to the existing Procurement Nondiscrimination Program and the development of race and gender conscious elements to achieve this result in a manner that will comply with the requirements of the U. S. Constitution and federal statutes; and

WHEREAS, the Metropolitan Government recognizes the importance of involving the Mayor's Office and the Chief Diversity, Equity and Inclusion Officer (Chief Diversity Officer) in the development and implementation of the EBO Program and, accordingly, the need for coordination, consultation, and information-sharing as between the Chief Diversity Officer and the Finance Director and Purchasing Agent regarding this EBO Program; and

WHEREAS, the Metropolitan Government considers it important and beneficial to formalize the various duties and responsibilities of the Business Assistance Office (BAO), the Purchasing Agent, and the Chief Diversity Officer in the implementation of the EBO, including consultation and coordination among these offices; and

WHEREAS, the Metropolitan Government intends for the EBO Program to govern and be applicable to the MWBE Program.

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY:

Section 1. That Title 4, Chapter 4.46, of the Metropolitan Code of Laws is hereby revised and amended as follows:

Chapter 4.46. EQUAL BUSINESS OPPORTUNITY PROGRAM

4.46.001 Short Title.

This program shall be known as the "Metropolitan Government of Nashville and Davidson County Equal Business Opportunity Program."

4.46.010 Policy and Objectives.

- A. Policy Statement. It is the policy of the Metropolitan Government of Nashville and Davidson County to promote full and equal business opportunities for all persons doing business with the Metropolitan Government by increasing the purchase of

- goods and services from minority-owned and women-owned businesses within the area of the Metropolitan Government. It is further the policy of the Metropolitan Government that firms seeking to participate in contracting and procurement activities with the Metropolitan Government are not prevented from doing so on the basis of the race, color, national origin, or gender of their owners and that the Metropolitan Government not be a passive participant in any private scheme of discrimination.
- B. Promotion of Equal Opportunity. The Metropolitan Government strictly prohibits discrimination against businesses based on the race, color, national origin, or gender of their owners or employees in the conduct of any Metropolitan Government affairs. No person shall be denied the benefit of, or otherwise discriminated against, on the grounds of race, color, national origin or gender in connection with the award or performance of any contract paid for, in whole or in part, with funds of the Metropolitan Government.
 - C. Program Objectives. The objective of the Equal Business Opportunity Program (the "EBO Program") is to promote and encourage full and open competition in all Metropolitan Government procurement and purchasing; encourage all Metropolitan Government personnel involved in procurement and contracting activities to utilize appropriate purchasing procedures; to prevent the Metropolitan Government from becoming a passive participant in any unlawful discrimination; to spur economic development in the public and private sectors of the local economy; and, to rectify any active or passive participation in such unlawful discrimination.
 - D. Program Coverage. The EBO Program and its stated objectives and provisions shall cover and be applicable to the Metropolitan Government's MWBE program.
 - E. Commitment to Program Objectives. The Metropolitan Government is committed to achievement of the EBO Program objectives and, accordingly, to providing the necessary budgetary, staffing, and support resources necessary for the success of the EBO Program.

4.46.020 Definitions.

For the purpose of this Chapter, the following words, terms, phrases and abbreviations shall have the following meanings:

African American: Means persons having origins in any black racial group of Africa. It includes people who indicate their race as "Black, African American, or Negro," or provide written entries such as African American, Afro American, Kenyan, Nigerian, or Haitian.

African American Business Enterprise (AABE): Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function, and that is owned and controlled by one or more African Americans.

Annual Aspirational Goal: Means a non-mandatory annual aspirational percentage goal for overall MWBE Prime and Subcontractor participation in Metropolitan Government contracts for Construction, Professional Services, Goods and other Services contracts. This goal is established every five (5) years by a duly-authorized disparity study and based upon and derived from the Prime and Subcontractor availability statistics provided therein, and is measured every year to ascertain program effectiveness.

Asian: Means persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

Asian Business Enterprise (ABE): Means a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Asian individuals.

Availability: Means being “qualified” to perform work for the Metropolitan Government. This means that the Bidder does business within an industry group from which the Metropolitan Government and its agencies make certain purchases; the firm's owner has taken steps to do business with the Metropolitan Government and qualified itself to do such business by registering or certifying; and the firm is located within a relevant geographical area such that it can do business with the Metropolitan Government.

Bid: Means a quotation, proposal, sealed bid or offer to perform or provide labor, materials, supplies or services to the Metropolitan Government for a price.

Bidder: Means any individual, sole proprietorship, partnership, joint venture, or corporation that submits a Bid to the Metropolitan Government.

Certification: Means the qualifying process that assures buyers and local, state, and federal agencies that a particular business is an MWBE that performs a commercially useful function. Certification or Recertification shall mean official recognition and approval by the acceptable certifying agency and/or Metropolitan Government that a business meets the qualification criteria of an MWBE, as set forth in this EBO Program. Certification or Recertification relates to qualifications regarding ownership and control, not the quality of the service or product.

Commercially Useful Function: Means performance or provision of real and actual services by a Participant under a contract with the Metropolitan Government or under a subcontract with another business enterprise under a contract with the Metropolitan Government. In determining whether a business is performing a commercially useful function, the following non-exclusive factors will be considered:

- i) the nature and amount of work contracted;
- ii) whether the MWBE has the skill and expertise to perform work for which it has been certified;
- iii) whether the MWBE actually performs, manages and supervises the work;

- iv) whether the MWBE intends to purchase commodities and/or services from a non-MWBE and simply resell same to the general or prime contractor for the purpose of allowing those commodities and/or services to be counted towards assessment of a Benchmark or fulfillment of a goal (if implemented);
- v) standard industry practices relating to the use of subcontractors. Consistent with standard industry practices, a MWBE subcontractor may enter into second tier subcontracts provided that no more than twenty-five percent of the work thereunder will be performed by a non-MWBE unless the subcontractor demonstrates to the satisfaction of the Metropolitan Government that the subcontracting arrangement is consistent with standard industry practice.

Compliance: Means the condition existing when a Participant has met the requirements of this EBO Program.

Control or Controlled: For the purpose of determining whether the owner or owners of a potential MWBE controls the potential MWBE, the Metropolitan Government shall consider all of the facts in the record viewed as a whole, including, without limitation the following:

- i) Whether the potential MWBE is an independent business, which means that its commercial viability does not depend on another firm or firms.
- ii) Whether the potential MWBE is subject to any formal or informal restrictions that limit the customary discretion of the MWBE owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the owner of the potential MWBE from making any business decision without the cooperation of another individual. This paragraph does not preclude a spousal co-signature on documents.
- iii) Whether the owner of the potential MWBE possesses the power to direct or cause the direction of the management and policies of the business enterprise and to make the day-to-day as well as long term decisions on matters of management, policy and operations.
- iv) Whether the owner of the potential MWBE has an understanding of, and managerial and technical competence directly related to, the type of business in which the business enterprise is engaged and the business enterprises' operations. Generally, experience limited to office management, administration, or bookkeeping functions, unrelated to the principal business activities of the business enterprise is insufficient to demonstrate control.
- v) Whether, if a state or local law requires the owner of a particular type of firm to have a particular license or other credential, the owner of the potential MWBE possesses the required license or credential.

Covenant of Non-Discrimination: Means, collectively, one or more contractual affirmative promises (1) to adopt the policies of the Metropolitan Government relating to the

participation of MWBEs in the procurement process; (2) to undertake certain good faith efforts to solicit MWBE participation; and (3) not to otherwise engage in discriminatory conduct against MWBEs.

First Ranked Bidder: Means an individual, sole proprietorship, partnership, joint venture, or corporation that has submitted a Bid that, subject to review as contemplated in this Chapter, has been tentatively determined pursuant to the requirements of this Title to be the lowest cost bid or highest-ranked proposal.

Goal, or Contract-by-Contract, or Project-by-Project Goal: Means race or gender-conscious corrective measures administered on a contract-by-contract or project-by-project basis which measure sets a percentage-based minimum participation level for MWBE subcontractors based on the available subcontracting opportunities for that project and the available firms and may be set as MBEs and WBEs or any ethnic subset of MBEs.

Goal Setting Committee ("GSC"): Means a committee comprised of the head of the BAO, the Purchasing Agent, and the head of the originating Department, which Committee is, tasked with setting contract/project goals for the EBO Program. All goals for the EBO Program are subject to the approval of the Purchasing Agent prior to its implementation.

Good Faith Efforts: Means the voluntary actions of a Participant undertaken in good faith to ensure that it does not discriminate in its contracting practices and to explain any failure to meet either an Annual Aspirational Goal or a contract/project Goal set in accordance with this legislation.

Hispanic American: Means people who identify with the terms "Hispanic" or "Latino" and who classify themselves in a specific Hispanic or Latino category such as "Mexican," "Puerto Rican," "Cuban," or "other Spanish, Hispanic, or Latino."

Hispanic American Business Enterprise: Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function, and that is owned and controlled by one or more Hispanic Americans.

Joint Venture: Means an association of two or more independent persons, partnerships, corporations (or any combination of them) formed, consistent with the laws of the State of Tennessee, to perform one or more specific contracts limited in scope and duration.

Minority Business Enterprise ("MBE"): Refers to a business enterprise maintaining a significant business presence in the Program Area and performing a commercially useful function that is owned by one or more of the following: (1) African Americans, (2) Native Americans, (3) Hispanic Americans, and (4) Asian Americans.

Minority or Women Owned Business Enterprise ("MWBE"): Refers to a business enterprise maintaining a significant business presence in the Program Area and performing a commercially useful function that is owned by one or more of the following: (1) African Americans, (2) Native Americans, (3) Hispanic Americans, (4) Asian Americans and (5)

Women. Racial and gender categories are separated for monitoring and tracking purposes only.

Metropolitan Government: Means the Metropolitan Government of Nashville and Davidson County, including any of its operating elements, officers, and/or employees acting with authority, but excluding the Metropolitan Development and Housing Authority, Nashville Electric Service, Metropolitan Transit Authority, the Metropolitan Nashville Public Schools, the Metropolitan Hospital Authority, the Metropolitan Sports Authority and the Metropolitan Nashville Airport Authority.

Metropolitan Nashville Disparity Studies: Means the Disparity Studies prepared by Griffin & Strong, P.C., and submitted to the Metropolitan Government in December 2004, and in August 2018.

MWBE Owned: Means that African American, Native American, Hispanic American, Asian American or woman owner(s) who are citizens or permanent residents of the United States individually or collectively possess an ownership interest of at least fifty-one percent (51%) of the business.

Native American: Means persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

Native American Business Enterprise (NABE): Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function and which is owned and controlled by one or more Native Americans.

Non-Compliance: Means the condition existing when a Participant has failed to meet the requirements of this EBO Program.

Notice: Means written communication delivered to the recipient, including hand delivery, express delivery, electronic delivery or by certified mail.

Participant: Means an individual or entity that enters into a contract with the Metropolitan Government to provide goods or services within the scope of the EBO Program, or a subcontractor or supplier to such an individual or entity.

Program or EBO Program: Means the Equal Business Opportunity Program.

Purchasing Agent: Shall have the meaning given in section 8.108 of the Metropolitan Charter.

Program Area: Means the Metropolitan Nashville Statistical Area, which includes Cannon (TN), Cheatham (TN), Davidson (TN) Hickman (TN), Macon (TN), Maury (TN), Robertson (TN), Rutherford (TN), Smith (TN), Sumner (TN), Trousdale (TN), Williamson (TN), Wilson (TN), and Dickson (TN) counties.

Purchasing Sector: Means the UNSPSC category for the specific procurement of construction, non-professional services and professional services.

Race/Gender-Conscious: Means any governmental or legislative policy or programmatic action that uses race or gender as criteria for participation.

Race/Gender-Neutral: Means any governmental or legislative policy or a programmatic action in which race or gender is not among the criteria for participation.

Satisfactorily Completed or Satisfactory Completion: Means all of the tasks called for in a contract or subcontract have been accomplished and documented as required by the Metropolitan Government.

Significant Business Presence: Means that a business enterprise with an established place of business in the Program Area at which one or more of its employees is regularly based and that such place of business has a substantial role in the business' performance of a commercially useful function as herein defined. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not constitute a significant business presence.

Supplier: Means a warehouser or manufacturer of materials, supplies or equipment that contracts directly with a Bidder to provide such materials, supplies or equipment on a project that involves a trade or service. For purposes of measuring the total contract dollars awarded or paid to suppliers on projects, only amounts paid to suppliers of goods customarily and ordinarily used based upon standard industry or trade practices shall be counted.

Underutilization: Means the percentage of dollars spent by the Metropolitan Government with MWBE's is less than participation of MWBE's than reasonably expected based on the availability of MWBE's within the Program Area.

UNSPSC: Means the United Nations Standard Products and Services Code used to identify the Purchasing Sector.

Women Business Enterprise (WBE): Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more women and is not otherwise certified as an MBE.

4.46.030 Office of Minority and Women Business Assistance.

- A. In the department of finance, division of purchases, the minority and women business assistance section shall continue to be designated as the Office of Minority and Women Business Assistance ("Business Assistance Office" or "BAO").
- B. Duties. The BAO, in consultation and coordination with the Purchasing Agent and the Chief Diversity, Equity and Inclusion Officer ("Chief Diversity Officer"), shall be primarily responsible for the administration and enforcement of the EBO Program. It

shall encourage equal business opportunities to achieve the policies and objectives of the EBO Program by:

- (1) Preparing written rules, regulations and procedures consistent with this Program for submission to and approval by the Procurement Standards Board as provided in Section 4.08.020 of this code.
- (2) Publishing and making public said rules, regulations and procedures at least thirty (30) days prior to their effective date.
- (3) Verifying certification of MWBEs, and evaluating the feasibility and propriety of accepting certifications from other governmental entities or industry groups, within or outside the Program Area (“reciprocal certification”).
- (4) Recruiting businesses to apply for certification as an MWBE through contact with other government agencies, community organizations or business associations, or by advertising or other suitable methods.
- (5) Maintaining outreach and assistance programs to promote equal contracting opportunities for MWBEs that wish to do business with the Metropolitan Government.
- (6) Distributing annual “forecasting” report(s). Following each fiscal year budget approval for the Metropolitan Government, the Purchasing Agent shall provide to the Finance Director, BAO head, and Chief Diversity Officer an overview of the anticipated expenditures of each governmental Department, and shall develop a preliminary project plan. This report shall be a public record.
- (7) Maintaining a current database of certified and available MWBEs and making this database accessible to interested parties; that will include the types of services provided by the business enterprise and contact information for the business enterprise. A list from the database will be made available to Participants to assist them in their efforts to meet the Annual Aspirational Goals or contract/project goals of the EBO Program. The list prepared from the database will specify which firms the Metropolitan Government has determined to be certified in accordance with the Metropolitan Government definitions for MWBEs.
- (8) Monitoring utilization of MWBE participation on projects for data gathering and informational purposes.
- (9) Developing and supplying to each Bidder as part of each Bid solicitation standard forms appropriate for consideration and evaluation of the Bid.. The BAO shall revise these forms as necessary consistent with the purpose and requirements of this Chapter.
- (10) Investigating written complaints as provided herein below.
- (11) Notifying affected parties in writing of their right to review an adverse recommendation of the BAO.

- (12) Preparing reports as requested by the Purchasing Agent or the Finance Director as well as semiannual and annual reports as required in this Chapter.
 - (13) Performing other tasks as may be required to fulfill the above-stated duties of the Business Assistance Office.
- C. Authorization to Monitor. The BAO shall be authorized to collect from all Participants such data and information as is necessary to monitor this Program. This information may include information regarding business ownership, supplier information, subcontractor information, all of which shall reflect the race, ethnic origin, gender, and business location of the identified businesses. The BAO shall continuously monitor the participation of MWBEs in the procurement of construction, non-professional services and professional services for the Metropolitan Government. Such monitoring shall include, without limitation, a statistical analysis of each construction trade, non-professional service and professional service to determine whether there is utilization of MWBEs in a manner that is proportionate to the identified availability range. The BAO will provide written reports to the Purchasing Agent, Finance Director, and Chief Diversity Officer upon request but not less frequently than quarterly.
- D. Duty to Report. The Business Assistance Office shall submit an annual report to the Metropolitan Council regarding the effectiveness of the EBO Program. Such report shall include, without limitation, a summary of the purchases, contracts and subcontracts placed with MWBEs for the period and the relative percentage to the total of purchases and contracts for that period. The report shall also emphasize quantity and quality of MWBE involvement by dollar volume. The report shall specify the race, national origin, gender, and UNSPSC with each category reported separately. Payments made to non-certified MWBEs shall be included as a separate set of figures for purposes of tabulating the total contract dollars going to MWBEs. The report shall include an analysis of the percentage for the reporting period of MWBE awards of the total awards for each MWBE category and Purchasing Sector and the percentage of availability of MWBEs in the Program Area for each MWBE category and Purchasing Sector.

The BAO shall also submit annual reports to the Purchasing Agent, Finance Director, and Chief Diversity Officer providing MWBE utilization figures or estimates for each construction trade, non-professional service, and professional service. The utilization data provided in these reports shall be used to compare program outcomes to the availability figures set forth in the applicable disparity study (and the aspirational goals set based on the study), and may be used to assist in the establishment of the contract-by-contract/project-by-project MBE and WBE goals discussed herein in Section 4.46.060(B).
- E. Contractors' Closeout Activity Reports: In accordance with the Rules and Regulations for the Program, prime contractors and prime consultants shall provide closeout activity reports to the BAO identifying activities of all subcontractors and sub-consultants in order to monitor MWBE participation.

- F. Authority to Investigate Discriminatory Practices: Should a Bidder or Participant submit a written complaint of discrimination; the BAO is authorized to investigate the complaint. An investigation may also be initiated based solely on a finding of a significant statistical disparity from the Annual Aspirational Goal or contract/project goal(s), as detailed in Section 4.46.060 herein. The details of any investigation, including findings, shall be recorded and maintained by the BAO.
- G. Evaluation of Compliance: Pursuant to Section 4.46.080, prior to issuing a notice of award the BAO shall review a Bid when the Purchasing Agent has reached an intent to award.

4.46.040 EBO Program Scope and Applicability.

The following are the categories of Metropolitan Government contracts covered by the Program:

Category A -- Construction: Includes any and all horizontal and vertical construction, including new construction, rehabilitations, remodeling and repairs.

Category B -- Non-professional Services: Encompasses the procurement of advertising, printing, non-construction repairs and maintenance, janitorial services, training seminars and workshops, computer and information systems, security, shipping and mailing, microfiche and microfilm, courier, storage, travel, consulting and other non-professional services.

Category C -- Professional Services: Includes the purchase of any or all services covered by Section 4.08.080 for which applicable selection criteria may require a Participant to possess a license or other certificate of competency such as accounting, auditing, architectural, and engineering.

Category D—Goods: Any and all products, supplies, equipment or commodities.

4.46.050 MWBE Designation.

- A. Certification. Certification is the qualifying process that ensures that a particular business is a MWBE that performs a commercially useful function. Certification assures that interested MWBEs have the proper ownership, control, and management as defined in the Program. Current contact information about the certifying entity shall be maintained by the BAO and provided to interested persons upon request.
- B. Reciprocal Certification. Subject to the approval of the Director of Finance, the BAO may accept certification of a MWBE from another government or private entity having certification standards at least as stringent as those created in this Chapter.

4.46.060 Annual Aspirational Goal and Project-By-Project Goals.

- A. Annual Aspirational Goal. A non-mandatory annual aspirational percentage goal for overall MWBE Prime and Subcontract participation in Metropolitan Government contracts shall be established for Construction, Professional Services, Goods and other Services contracts. This Annual Aspirational Goal is to be based upon the MBE/WBE availability and utilization data collected and analyzed every five (5) years as part of a duly-authorized disparity study. The Annual Aspirational Goal is not to be applied to individual contracts, but rather, is intended to serve as a benchmark against which to measure the overall effectiveness of the EBO Program on an annual basis, and to gauge the need for future adjustments to the mix and to the aggressiveness of various remedies being applied under the EBO Program.
- B. Percentage Goals for MBE and WBE participation may be established by the BAO Staff on a project-by-project or contract-by-contract basis, using updated MBE and WBE utilization data for the particular goods and services being purchased in a given contract. It is intended that such goal-setting will be based upon careful analysis by the BAO Staff of the availability of Commercially Useful subcontracting opportunities within a given contract/project and the relative availability of MBE and WBE firms to perform required tasks on such subcontracting opportunities. Such goals shall be timely provided to the GSC for its consideration and are subject to the approval of the Purchasing Agent. Although no subcontractor goals shall be set project-by-project or contract-by-contract for Goods, any utilization of MWBEs that provide goods shall be counted toward annual aspirational percentage and overall project or contract goals.
- C. Goals in Bids/Proposals. The BAO and Purchasing Agent may consider the following types of participation toward achievement of a goal:
 - (1) The total dollar value of the contract may be counted toward the specified goal when the Prime Contractor demonstrates a commercially useful function(s) for each proposed Subcontractor. This includes the fees and commissions charged for professional services, legal counsel, manufacturers, financial consultants, and insurance agents.
 - (2) The actual portion of MBE or WBE participation in a joint venture is counted toward the goal.
- D. MBE/WBE Participation in Meeting Goals. All Prime and Subcontractor participants, including MBE/WBE participants, shall make good faith efforts to attain goals through all subcontractor work, as described in the below subsection addressing Good Faith Efforts (GFE).
 - (1) Prime Contractors: A Participant may subcontract portions of its contract consistent with industry standards. However, should a prime contractor subcontract greater portions of the project than are consistent with industry standards, then the MWBE will not have performed a commercially useful

function as defined herein. Therefore, such participation by a MWBE will not be counted towards any goal.

- (2) Subcontractor Participation: Where a Participant utilizes one or more subcontractors to attain any goal(s) for an underutilized subcategory, the prime contractor may count said subcontractor work toward goals. In no way shall subcontractors' work or dollar amount be construed to count toward said goal more than once. Only expenditures to MWBE subcontractors that perform a commercially useful function in the work of the project or contract may be counted.
- (3) Supplier Participation: Where a Participant utilizes suppliers to satisfy the goal(s) in whole or in part, the MWBE suppliers must perform a commercially useful function. Supplier participation may be approved upon review of the following factors:
 - (a) the nature and amount of supplies to be furnished;
 - (b) whether the MWBE is a manufacturer, wholesaler or distributor of the supplies and has the capabilities to deliver same in accordance with its certification;
 - (c) whether the MWBE actually performs, manages and supervises the work to furnish the supplies; and
 - (d) whether the MWBE intends to purchase supplies from a non-MWBE and simply resell same to the general or prime contractor for allowing those supplies to be counted towards fulfillment of the goal(s).
- (4) Joint Venture Participation: Where Participants engage in a joint venture to meet a goal, the prime contractor shall demonstrate that the MWBE joint venturer's participation meets the standards for a commercially useful function. The BAO and Purchasing Agent shall review and approve all contractual agreements and other supporting documentation to determine the percentage of MBE/WBE participation resulting from the joint venture that may be credited towards applicable goals of the project; and shall make the determination based on the following factors:
 - (a) the initial capital investment of each venture partner;
 - (b) the proportional allocation of profits and losses to each venture partner;
 - (c) the sharing of the right to control the ownership and management of the joint venture;
 - (d) actual participation of the venture partners in the performance of work under the project or contract; and
 - (e) other pertinent factors of the joint venture.

- (5) The degree to which any goals have been attained by joint ventures between MWBE firms, and between MWBE and non-MWBE firms, shall be calculated as follows:
 - (a) A joint venture consisting of a MWBE and non-MWBE firm functioning as a prime contractor will be credited with MWBE participation based on the percentage of the dollar amount of the work to be performed by the MWBE.
 - (b) In joint venture Proposals in which all joint venture Participants are MWBEs, the joint venture will be credited with MWBE participation only for that portion of the dollar amount of the contract which MWBEs perform and that portion subcontracted to MWBE firms.
 - (c) In joint venture Proposals, Participants will receive credit toward the goal for the dollar amount purchased from MWBE suppliers.

4.46.070 Bid Requirements

No Bid submitted to the Metropolitan Government for work within the scope of the Program shall be considered responsive unless it includes each of the following documents:

- A. Covenant of Non-Discrimination. Each Bidder must submit a duly executed and notarized Covenant of Non-Discrimination. This written instrument shall contain promises, averments and/or affirmations made by the Bidder:
 - (1) to adopt the policies of the Metropolitan Government relating to equal opportunity in contracting on projects and contracts funded, in whole or in part, with funds of the Metropolitan Government;
 - (2) to attempt certain good faith efforts to solicit MWBE participation on projects and contracts in addition to regular and customary solicitation efforts;
 - (3) not to otherwise engage in discriminatory conduct;
 - (4) to provide a discrimination-free working environment;
 - (5) that this Covenant of Non-Discrimination shall be continuing in nature and shall remain in full force and effect without interruption;
 - (6) that the Covenant of Non-Discrimination shall be incorporated by reference into any contract or portion thereof which the Bidder may hereafter obtain; and
 - (7) that the failure of the Participant to satisfactorily discharge any of the promises of nondiscrimination as made and set forth herein shall constitute a material breach of contract.
- B. Statement of MWBE Utilization. Each Bidder shall submit a Statement of Subcontractors. The Statement shall include each successful subcontractor's name, UNSPSC Code, race, gender, national origin, business location, work to be performed, dollar value of the project, and percentage attributable to each subcontractor. In

addition, copies of each successful subcontractor's price quotes must be submitted by the close of business on the second business day following submission of a Bid.

- C. Statement of Interested Subcontractors/Vendors. Each Bidder shall submit a Statement of Interested Subcontractors/Vendors that shall include each individual or entity requesting information about the project or solicited for participation on the project. The list of subcontractors shall include those persons who did not actually submit a price quotation or a bid, rather just requested information. The statement shall include the individual's or entity's name, UNSPSC Code, race, gender, national origin, business location, and information requested.
- D. Statement of Bid Proposals/Price Quotations. Each Bidder shall submit a Statement of Bid Proposals/Price Quotations. The Statement shall include each potential subcontractor's vendor's name, UNSPSC Code, race, gender, national origin, business location, work requested to be performed, and price quotation and/or bid. The statement shall include only those potential subcontractors not selected that actually submitted a bid or proposal for the project.

Additional documents which may be required from a responsive Bidder, post-Bid, include:

- E. Letter of Intent to Perform as a Subcontractor/Joint Venture. In the event that a Bidder or Participant proposes to use subcontractors or joint ventures if awarded a contract with the Metropolitan Government, such Bidder shall be required to submit to the BAO a letter of intent signed by both the subcontractor/joint venturer and Bidder. This form is to be completed and submitted by the apparent successful Bidder by the end of the second business day following issuance by the Purchasing Agent of a notice of award of contract.
- F. Other Information and Data. The BAO may request additional information and data prior to a contract award. This information may include, without limitation, information regarding business ownership of all subcontractors to be utilized on the project, all of which shall reflect the race, gender, ethnic origins, location, and structure of the identified businesses, in order to be eligible for contract award. The BAO with the approval of the Purchasing Agent may declare any Bid non-responsive upon failure or refusal of the Bidder to provide information and data required by this Program and requested by the Metropolitan Government pursuant to this paragraph.
- G. Reporting Subcontractor Substitution or Replacement. The prime contractor shall report any replacements or substitutions of the use of subcontractors to BAO in advance of making the substitution. For reporting purposes, the prime contractor shall report to the BAO statistical data pertaining to the new subcontractor, including race, gender, national origin, and business location.

4.46.080 Evaluation of Bid for Program Compliance

- (A) If the Bid submitted by the First Ranked Bidder in response to a solicitation issued by the Purchasing Agent includes the documents required by Section 4.46.070 of this

Chapter, and if the Bidder has not met the applicable goal, the Good Faith Efforts documentation required in Section 4.46.080(E) below, the Purchasing Agent shall forward the Bid to the BAO. The BAO shall then evaluate whether it believes the First Ranked Bidder has engaged in and adequately documented with its Bid efforts to ensure that its process of soliciting, evaluating and awarding subcontracts, placing orders, and partnering with other companies has met the criteria of the EBO Program, including documented Good Faith Efforts, when appropriate. Upon a recommendation of compliance by the First Ranked Bidder, the BAO shall notify the Purchasing Agent, and the Purchasing Agent shall proceed to award a contract upon concurrence with the BAO recommendation.

- (B) If the BAO's preliminary analysis suggests that the First Ranked Bidder has failed to comply with the requirements of the EBO Program, the BAO shall send written notice to the Bidder. The notice shall set forth with particularity the reasons for the questioning of non-compliance and shall schedule a conference at which the issue may be reviewed with the Bidder. The Bidder shall be permitted to present any additional materials relevant to the question of non-compliance for consideration by the BAO. If, after the conference and upon consideration of all relevant materials, the BAO is convinced that the Bidder is in fact compliant with the requirements of this Chapter, the BAO shall notify the Purchasing Agent, who shall proceed with an award of contract upon concurrence with the BAO recommendation. If the BAO concludes that the Bidder is not compliant with the requirements of this Chapter, the BAO shall so notify the Purchasing Agent, who shall, upon concurrence with the conclusion and with notification to the Department of Law, reject that Bidder's Bid as nonresponsive, identify another Bidder as the First Ranked Bidder, and forward that Bidder's Bid to the BAO. The BAO shall then proceed to evaluate the Bid submitted by the new First Ranked Bidder in accordance with this section. The determination of nonresponsiveness shall be made pursuant to Section 4.12.110. Decisions under this section are subject to protest in accordance with Section 4.36.010, *et seq.*, and the rules and regulations of the Purchasing Division.
- (C) Good Faith Efforts. In addition to regular and customary solicitation processes for contacting potential subcontractors and/or vendors, all Bidders are required to:
- (1) Make efforts to include MWBEs in the procurement process;
 - (2) Make efforts to ensure that businesses are not discriminated against on the basis of race, ethnicity or gender;
 - (3) Ensure that prospective subcontractors, vendors, suppliers and others are not denied opportunities to compete for work for the Metropolitan Government on the basis of their race, ethnicity, or gender;
 - (4) Afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of the Metropolitan Government to the extent of their availability, capacity and willingness to compete;

- (5) Demonstrate compliance with these Program requirements with appropriate documentation submitted with their Bids;
 - (6) Maintain for a minimum of three years after completion of the contract and final payment detailed records of all correspondence and responses thereto, logs of all telephone calls made and received regarding Metropolitan Government solicitations, copies of advertisements in publications and other media, and other relevant papers required by the Program.
 - (7) Cooperate with any document request or other investigatory effort by the BAO in its consideration of the Bid as provided hereinabove.
- (E) Methods of Demonstrating Good Faith Efforts. Where an Annual Aspirational Goal or applicable contract/project goal has not been achieved, Bidders shall provide to BAO a statement that the Bidder has delivered written notice to at least three (3) available certified MWBEs if use of MWBEs is reasonable and if BAO can provide at least three MWBEs for the applicable category. Upon request, names, addresses, and telephone numbers for available MWBEs shall be provided by the BAO for each potential subcontracting or supply category in the solicitation. In addition, a Bidder must deliver written notice to all individuals or entities requesting information on the solicitation. The written notice sent to potential subcontractors or vendors shall contain the following:
- (i) Sufficient information about the plans, specifications, and relevant terms and conditions of the solicitation to permit development of an understanding of work requirements. This may include information about the work that will be subcontracted or the goods that will be obtained from subcontractors and suppliers;
 - (ii) A contact person knowledgeable of the project documents within the Bidder's office to answer questions about the conditions of the contract;
 - (iii) Information regarding the Bidder's bonding requirements;
 - (iv) The deadline for submission of price quotations.

In addition, where the applicable goal has not been achieved, the Bidder shall also demonstrate its Good Faith Efforts by methods that may include, as applicable, the following:

- (1) Attending informational meetings to update potential subcontractors or vendors of subcontracting or supply opportunities.
- (2) Dividing the contract, in accordance with normal industry practice, into small, economically feasible segments that could be performed by a MWBE. Under no circumstances, however, shall a Bidder segment work solely for the purpose of utilizing MWBEs as subcontractors where such segmentation is not in accordance with common and accepted industry practices relating to the utilization of other firms as subcontractors.

- (3) Providing a written explanation for rejection of any potential subcontractor or vendor to the Bidder, including the name of the firm awarded the subcontract or supply agreement. The BAO will maintain these records and make same available to any subcontractor or vendor rejected by the Bidder.
- (4) Providing a non-discriminatory work site. Maintaining a work environment free of harassment, intimidation and coercion at all construction sites, offices and other facilities at which the Bidder's employees are assigned to work. The Bidder shall specifically ensure that all labor supervisors, superintendents, and other on-site supervisory personnel are aware of and carry out the Bidder's obligation to maintain a non-discriminatory work environment.
- (5) Soliciting specific individual MWBEs whose availability as potential sources of goods or services can be reasonably ascertained. This measure includes sending letters or making other personal contacts with specific certified MWBEs including those that the Bidder has contracted with in the past as well as other MWBEs with which the Bidder may be unfamiliar, but whose identities can be ascertained from a directory of certified MWBEs maintained by the BAO.
- (6) Sending letters or making other personal contacts with other programs as well as private trade associations in the Program Area which are known to publicize contracting and procurement opportunities for the benefit of their respective associates and/or members.
- (7) Advertising in trade publications of general circulation in the Program Area. The advertisement shall identify and describe the specific subcontracting or other opportunity in reasonable detail.
- (8) Following up initial solicitations by contacting potential subcontractors or vendors to determine, with certainty, whether these firms are interested in participating on the contract.
- (9) Thoroughly investigating the potential subcontractor or vendor's capabilities in good faith.
- (10) Providing reasonable assistance to a MWBE in need of equipment, supplies, bonding, letters of credit and/or insurance.
- (11) Providing reasonable technical assistance to MWBEs to ameliorate any deficiencies of technical knowledge or advance skill, where such assistance is undertaken by the Bidder to facilitate the MWBE's successful participation on a project or contract.

4.46.090 Mentor-Protégé Initiative.

The BAO shall encourage all contractors and subcontractors to participate in a Mentor/Protégé initiative on a voluntary basis for the purpose of enhancing the potential of all MWBEs by building business capability to expand contracting opportunities within an agreed framework of conditions. The initiative is intended to assist in integration of on-the-job training for all emerging businesses and permit a

prime contractor to offer assistance on a limited term agreement, generally one project. Any interested contractor or subcontractor may submit with a Bid a completed Mentor/Protégé Promise demonstrating that such a relationship has been formed. The BAO shall make available a database of potential Mentor and Protege firms. No contractor or vendor shall be penalized or preferred based upon participation or non-participation in this initiative. All administrative functions should be performed by the Protégé personnel. The Protégé is expected to maintain final decision-making responsibilities regarding the scope of its work.

4.46.100 Sanctions and Penalties for Non-Compliance.

A. The BAO shall recommend appropriate mechanisms to enforce the provisions of the EBO Program to the Purchasing Agent including, but not limited to, withholding of progress payments for non-compliance. Further, the failure of a Bidder or Participant to comply with the requirements of this Chapter may be considered a material breach of Participant's agreement with the Metropolitan Government and may be grounds for suspension or debarment pursuant to the standards set forth in Section 4.36.020 of this code. Sanctions shall not be imposed unless there is evidence of specific conduct on the part of Participant that is inconsistent with or in direct contravention of the applicable provisions of this Program. In determining appropriate sanctions, the Purchasing Agent, in consultation with the BAO, shall consider the following factors:

- (1) Whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a misunderstanding on the part of the Participant of the duties imposed on them by this Program;
- (2) The number of specific incidences of failure by the Participant to comply;
- (3) Whether the Participant has been previously suspended;
- (4) Whether the Participant has failed or refused to provide the BAO with any information required or requested by this Program;
- (5) Whether the Participant has materially misrepresented any applicable facts in any filing or communication to the BAO; and
- (6) Whether the Participant has subsequently restructured or taken other action to cure the deficiencies in meeting applicable requirements.

In the event that a Participant is able to adequately demonstrate and document good faith efforts to achieve initial compliance and/or perform as initially agreed-upon with regard to MBE/WBE participation, then the Participant shall not be liable for such sanctions or damages.

(B) Appeal of Sanctions. Sanctions imposed by the Purchasing Agent under this Chapter are subject to administrative review as follows:

- (1) A Participant has the right to appeal sanctions imposed by the Purchasing Agent to the Procurement Appeals Board ("Board"). Appeal of debarments

and suspensions shall be in accordance with Section 4.36.120 of this code. The Purchasing Agent shall inform the Participant of its rights to administrative review in the notice of imposition of sanctions provided to the Participant.

- (2) Time Limitation on Filing an Appeal. The aggrieved Participant shall file its appeal with the Board within thirty days of receipt of the Purchasing Agent's notice of imposition of sanctions.
- (3) Decision of the Procurement Appeals Board. On any appeal under this section, the Board shall promptly decide whether, or the extent to which, the sanction imposed on the Participant was in accordance with the Constitution, statutes, this code, regulations, and the best interest of the Metropolitan Government, and was fair. The Board may modify or reverse the sanction imposed on the Participant by the Purchasing Agent.

4.46.110 Severability.

If any of the provisions set forth in this Chapter, or any section, subsection, paragraph, sentence, clause, phrase, or word thereof shall be found to be invalid, illegal or unenforceable for any reason, the application of the remainder of this Chapter shall not be affected by such invalidity.

4.46.120 Program Evaluation and Sunset Provision

Beginning no later than August 1, 2021, and every five years thereafter, the Division of Purchases shall issue a Request For Proposals to undertake a comprehensive update of the full disparity study, and upon completion of each disparity study, present disparity study results to the Metropolitan Government, and following official review and a public comment period regarding those study findings and recommendations, the Metropolitan Government shall consider any proposed modifications to, or sunset of, the Equal Business Opportunity Program.

4.46.130 Application.

The revisions set forth in this Chapter shall not apply to any contract entered into and executed by the Metropolitan Government, or any formal solicitation issued, prior to the effective date of the revised ordinance.

Section 2. The Equal Business Opportunity program shall be applicable to procurements commenced 180 days following the enactment of this ordinance, or upon the earlier certification by the Director of Finance to the Metropolitan Council that the offices and processes contemplated by this ordinance have been established.

Section 3. This ordinance shall take effect from and after its final passage, the welfare of the Metropolitan Government of Nashville and Davidson County, Tennessee, requiring it.

APPROVED AS TO AVAILABILITY
OF FUNDS:

Talia Lomax-O'dneal
Director of Finance

APPROVED AS TO FORM AND
LEGALITY:

Metropolitan Attorney

INTRODUCED BY:

Members of Council